



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AD36

Land Uses; Special Uses; Procedures for Operating Plans and Agreements for Powerline Facility Maintenance and Vegetation Management Within and Abutting the Linear Right-of-Way for a Powerline Facility

AGENCY: Forest Service, (Agriculture) USDA.

ACTION: Final rule; technical amendment.

SUMMARY: The Forest Service, U.S. Department of Agriculture, is making purely technical, clarifying revisions to its existing regulations governing procedures for operating plans and agreements for powerline facility inspection, operation and maintenance, and vegetation management. The revisions are necessary to conform definitions and text in the regulations to revisions made to the proposed implementing directive in response to public comment. These purely technical, clarifying revisions do not formulate standards, criteria, or guidelines applicable to Forest Service programs and therefore do not require public notice and comment under section 14(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974.

DATES: Effective February 9, 2022.

FOR FURTHER INFORMATION CONTACT: Reggie Woodruff, Energy Program Manager, Lands and Realty Management, 202-205-1196 or reginal.woodruff@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule makes purely technical, clarifying revisions to the Department's existing regulations at 36 CFR 251.51 and 251.56(h) governing procedures for operating plans and agreements for powerline facility inspection, operation and maintenance, and vegetation management. The revisions

conform definitions in §251.51 and text in §251.56(h) to revisions made to the proposed implementing directive in response to public comment.

Specifically, the Department is adding the term “qualified vegetation management specialist” to the definition of “hazard tree” to be more inclusive of personnel titles used by owners and operators and is removing the reference to the Forest Service in connection with who may identify hazard trees because the owner or operator, not the Forest Service, is responsible for inspecting, identifying, and felling hazard trees.

In the definition of “minimum vegetation clearance distance,” the Department is adding the phrase “that is used to prevent flashover between conductors and vegetation for various altitudes and operating voltages” and removing the phrase “within or abutting the linear boundary of a special use authorization for a powerline facility” to better align the definition of minimum vegetation clearance distance with the industry definition.

In the definition for “operating plan or agreement for a powerline facility,” the Department is adding a reference to construction, reconstruction, and maintenance of access roads and trails, which are covered by an operating plan or agreement.

The Department is revising the definition for “powerline facility” to clarify that it includes communications equipment that is owned by the owner or operator; that solely supports operation and maintenance of the electric distribution or transmission lines; and that is not leased to other parties for communications uses that serve other purposes. Communications equipment that does not meet these criteria must be authorized under a separate special use authorization.

The Department is removing the terms “removal” and “remove” as they relate to hazard trees and vegetation in the definitions and text and replacing them with the terms “felling” and “fell” to accurately describe accepted treatment of hazard trees and vegetation.

Consistent with the defined term “linear right-of-way,” the Department is replacing the phrase “linear boundary of a special use authorization for a powerline facility” with the phrase “linear right-of-way for a powerline facility” in the definitions for “minimum vegetation clearance distance,” “emergency vegetation management,” “operating plan or agreement for a powerline facility (operating plan or agreement), and “non-emergency (routine) vegetation management.”

An owner or operator that meets either of the two criteria for an operating agreement specified in the governing statute, section 512 of the Federal Land Policy and Management Act (43 U.S.C. 1772), is eligible for an operating agreement. An owner or operator that meets both criteria is also eligible. To clarify that point, the Department is revising §251.56(h)(2) to provide that an owner or operator that meets the first and/or the second criterion is eligible for an operating agreement.

Consistent with the final implementing directive, for powerline facilities without an operating plan, the Department is revising §251.56(h)(3) to extend the deadline for submitting a proposed operating plan or agreement from August 31, 2023, to 18 months from the date the authorized officer notifies the owner or operator that a proposed operating plan or agreement must be submitted, which must occur no later than September 30, 2026. Revised §251.56(h)(3) gives the authorized officer the discretion to determine the sequence of notification of the requirement to submit a proposed modified operating plan or proposed operating plan or agreement, based on factors enumerated in the final implementing directive.

The final implementing directive provides for the requisite environmental analysis and consultation for routine vegetation management to be completed before a proposed operating plan or agreement is approved, or case-by-case after a proposed operating plan or agreement is approved, but before routine vegetation management is conducted. Accordingly, the Department is revising the second criterion in §251.56(h)(5)(viii)(A)

that must be met to conduct routine vegetation management without authorized officer approval to state that the proposed routine vegetation management must be covered by approval of a proposed operating plan or agreement or by subsequent case-by-case environmental analysis and consultation.

Also for consistency with the final implementing directive, the Department is revising §251.56(h)(5)(viii)(B) to provide that the owner or operator must notify the authorized officer by email of the location and type of emergency vegetation management as soon as practicable, but no later than 24 hours after completion, and that within 30 days of completion must submit to the authorized officer a written report detailing at a minimum the location, type, and scope of emergency vegetation management conducted, the reason it was conducted, the methods used to conduct it, and the resulting benefit.

For consistency with the final implementing directive, the Department is revising §251.56(h)(7) to require that at least every 10 years, rather than every 5 years, from the approval date of an operating plan or agreement, the owner or operator must review and, as appropriate not just as necessary, propose updates to the operating plan or agreement to ensure consistency with changed conditions. In addition, consistent with the final implementing directive, revised paragraph (h)(7) provides that proposed updates to an approved operating plan or agreement that are deemed significant by the authorized officer will be treated as proposed modifications and must be submitted by the owner or operator for review and approval by the authorized officer in accordance with the procedures described in paragraph (h)(6). Revised paragraph (h)(7) further provides that proposed updates that are deemed non-significant by the authorized officer may be made by written agreement of the owner or operator and the authorized officer.

Regulatory Certifications

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Consistent with Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether proposed, interim, and final rules that impose, eliminate, or modify requirements on non-Forest Service parties are significant and will review any proposed, interim, or final rules that OIRA has designated as significant. This final rule does not impose, eliminate, or modify requirements on non-Forest Service parties and therefore does not require a significance determination by OIRA. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Forest Service has developed this final rule consistent with E.O. 13563.

Congressional Review Act

Since this final rule does not impose, eliminate, or modify requirements on non-Forest Service parties, it is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act), 5 U.S.C. 804(2).

National Environmental Policy Act

This final rule will make purely technical, clarifying revisions to existing Forest Service regulations at 36 CFR 251.51 and 251.56(h) to conform to revisions made to the proposed implementing directive in response to public comment. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment (EA) or environmental impact statement (EIS) "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The Forest Service has concluded that this final rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an EA or EIS.

Regulatory Flexibility Act Analysis

The Forest Service has considered this final rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This final rule will not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The final rule will not impose recordkeeping requirements on small entities; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this final rule will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Forest Service has considered this final rule under the requirements of E.O. 13132, *Federalism*. The Forest Service has determined that the final rule conforms with the federalism principles set out in this E.O.; will not impose any compliance costs on the states; and will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Forest Service has concluded that the final rule does not have Federalism implications.

Consultation with Tribal Governments

The Forest Service has reviewed this final rule in accordance with the requirements of E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. The Forest Service has determined that national tribal consultation is not necessary for the final rule. The final rule, which will make purely technical, clarifying revisions to existing Forest Service regulations at 36 CFR 251.51 and 251.56(h) to conform to revisions made to the proposed implementing directive in response to public comment, does not impose, eliminate, or modify requirements on non-Forest Service parties and therefore does not have any direct effects on tribes.

Environmental Justice

The Forest Service has considered the final rule under the requirements of E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. The Forest Service has determined that the final rule is consistent with E.O. 12898.

No Takings Implications

The Forest Service has analyzed the final rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*. The Forest Service has determined that the final rule will not pose the risk of a taking of private property.

Energy Effects

The Forest Service has reviewed the final rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Forest Service has determined that the final rule will not constitute a significant energy action as defined in E.O. 13211, and OIRA has not otherwise designated the final rule as a significant energy action.

Civil Justice Reform

The Forest Service has analyzed the final rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. Upon issuance of the final rule, (1) all state and local laws and regulations that conflict with the final rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995

(2 U.S.C. 1531-1538), signed into law on March 22, 1995, the Forest Service has assessed the effects of the final rule on state, local, and tribal governments and the private sector. The final rule will not compel the expenditure of \$100 million or more by any state, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

The final rule does not contain information collection requirements as defined in 5 CFR Part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects

Electric power, Mineral resources, National Forests, Rights-of-way, and Water resources.

Therefore, for the reasons set forth in the preamble, the Department is amending part 251, subpart B, of title 36 of the Code of Federal Regulations as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for part 251 continues to read as follows:

Authority: [16 U.S.C. 472](#), [479b](#), [551](#), [1134](#), [3210](#), [6201-13](#); [30 U.S.C. 1740](#), [1761-1771](#).

2. The authority citation for subpart B continues to read as follows:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1772.

3. Amend §251.51 by revising the definitions of “Hazard tree”, “Minimum vegetation clearance distance”, “Operating plan or agreement for a powerline facility

(hereinafter “operating plan or agreement”), “Powerline facility”, and “Vegetation management” to read as follows:

§251.51 Definitions.

* * * * *

Hazard tree—for purposes of vegetation management for a powerline facility, any tree, brush, shrub, other plant, or part thereof, hereinafter “vegetation” (whether located on NFS lands inside or outside the linear right-of-way for the powerline facility), that has been designated, prior to failure, by a certified or licensed arborist, qualified vegetation management specialist, or forester under the supervision of the owner or operator to be:

(1) Dead; likely to die or fail before the next routine vegetation management cycle; or in a position that, under geographical or atmospheric conditions, could cause the vegetation to fall, sway, or grow into the powerline facility before the next routine vegetation management cycle; and

(2) Likely to cause substantial damage to the powerline facility; disrupt powerline facility service; come within 10 feet of the powerline facility; or come within the minimum vegetation clearance distance as determined in accordance with applicable reliability and safety standards and as identified in the special use authorization for the powerline facility and the associated approved operating plan or agreement.

* * * * *

Minimum vegetation clearance distance—the calculated distance (stated in feet or meters) that is used to prevent flashover between conductors and vegetation for various altitudes and operating voltages. The MVCD is measured from a conductor’s maximum operating sag to vegetation on NFS lands within the linear right-of-way for a powerline facility and on NFS lands adjacent to either side of the linear right-of-way for a powerline facility for purposes of felling or pruning hazard trees, which the owner or operator uses

to determine whether vegetation poses a system reliability hazard to the powerline facility.

* * * * *

Operating plan or agreement for a powerline facility (hereinafter “operating plan or agreement”)—a plan or agreement prepared by the owner or operator of a powerline facility, approved by the authorized officer, and incorporated by reference into the corresponding special use authorization that provides for long-term, cost-effective, efficient, and timely inspection, operation, maintenance, and vegetation management of the powerline facility on NFS lands within the linear right-of-way for the powerline facility and on NFS lands adjacent to either side of the linear right-of-way to fell or prune hazard trees and to construct, reconstruct, and maintain access roads and trails, to enhance electric reliability, promote public safety, and avoid fire hazards.

* * * * *

Powerline facility. One or more electric distribution or transmission lines authorized by a special use authorization, and all appurtenances to those lines supporting conductors of one or more electric circuits of any voltage for the transmission of electric energy, overhead ground wires, and communications equipment that is owned by the owner or operator; that solely supports operation and maintenance of the electric distribution or transmission lines; and that is not leased to other parties for communications uses that serve other purposes.

* * * * *

Vegetation management. (1) *Emergency vegetation management*—unplanned felling and pruning of vegetation on National Forest System lands within the linear right-of-way for a powerline facility and unplanned felling and pruning of hazard trees on abutting National Forest System lands that have contacted or present an imminent danger

of contacting the powerline facility to avoid the disruption of electric service or to eliminate an immediate fire or safety hazard.

(2) *Non-emergency (routine) vegetation management*—planned actions as described in an operating plan or agreement periodically taken to fell or prune vegetation on National Forest System lands within the linear right-of-way for a powerline facility and on abutting National Forest System lands to fell or prune hazard trees to ensure normal powerline facility operations and to prevent wildfire in accordance with applicable reliability and safety standards and as identified in an approved operating plan or agreement.

4. Amend §251.56 by revising paragraphs (h)(2), (h)(3), (h)(5)(viii), (h)(7), and (h)(10)(v) to read as follows:

§251.56 Terms and Conditions

* * * * *

(h) * * *

(2) *Use of operating agreements.* Powerline facilities that are not subject to the mandatory reliability standards established by the Electric Reliability Organization and/or that sold less than or equal to 1,000,000 megawatt hours of electric energy for purposes other than resale during each of the 3 calendar years immediately preceding March 23, 2018, may be subject to an agreement, instead of an operating plan. Powerline facilities that are not subject to an agreement must be subject to an operating plan.

(3) *Existing operating plans and lack of an operating plan.* The authorized officer shall determine, in consultation with the owner or operator of a powerline facility, whether the existing operating plan for that powerline facility is consistent with paragraph (h) of this section and shall notify the owner or operator of that determination. Within 18 months of the date of notification that the existing operating plan is inconsistent with paragraph (h) of this section, the owner or operator shall modify the

existing operating plan to be consistent with paragraph (h) of this section or, if eligible, shall prepare a proposed operating agreement and shall submit the proposed modified operating plan or proposed operating agreement to the authorized officer for review and approval. Existing operating plans that are consistent with paragraph (h) of this section do not have to be submitted for reapproval by the authorized officer. If an owner or operator does not have an operating plan, within 18 months of the date of notification from the authorized officer that a proposed operating plan or agreement must be submitted, the owner or operator shall submit to the authorized officer a proposed operating plan or agreement consistent with paragraph (h) of this section for review and approval. The authorized officer shall provide notification of the requirement to submit a proposed modified operating plan or a proposed operating plan or agreement no later than September 30, 2026. The authorized officer has the discretion to determine the sequence of notification, based on factors enumerated in implementing Forest Service directives.

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(5) * * *

(viii) Include the following procedures with regard to whether authorized officer approval is required for vegetation management:

(A) *Routine vegetation management.* Routine vegetation management must have prior written approval from the authorized officer, unless all 3 of the following conditions are met:

(1) The owner or operator has submitted a request for approval to the authorized officer in accordance with the specified timeframe in the approved operating plan or agreement;

(2) The proposed routine vegetation management is covered by approval of a proposed operating plan or agreement or by subsequent case-by-case environmental analysis and consultation; and

(3) The authorized officer has failed to respond to the request in accordance with the specified timeframe in the approved operating plan or agreement.

(B) *Emergency vegetation management.* Emergency vegetation management does not require prior written approval from the authorized officer. The owner or operator shall notify the authorized officer by email of the location and type of emergency vegetation management as soon as practicable, but no later than 24 hours after completion. Within 30 days of completion, the owner or operator shall submit to the authorized officer a written report detailing at a minimum the location, type, and scope of emergency vegetation management conducted, the reason it was conducted, the methods used to conduct it, and the resulting benefit;

* * * * *

(7) *Review and expiration of approved operating plans and agreements.* At least every 10 years from the approval date of an operating plan or agreement, the owner or operator shall review and, as necessary or appropriate, propose updates to the operating plan or agreement to ensure consistency with changed conditions. Proposed updates to an approved operating plan or agreement that are deemed significant by the authorized officer shall be treated as proposed modifications and shall be submitted by the owner or operator for review and approval by the authorized officer in accordance with the procedures described in paragraph (h)(6) of this section. Proposed updates that are deemed non-significant by the authorized officer may be made by written agreement of the owner or operator and the authorized officer. Upon expiration of a special use authorization for a powerline facility, the owner or operator shall prepare a new proposed operating plan or agreement, either solely or in consultation with the authorized officer, and shall submit it to the authorized officer for review and approval in accordance with the procedures described in paragraph (h)(6) of this section.

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(10) * * *

(v) Seek to minimize the need for case-by-case approvals for routine vegetation management (including hazard tree felling and pruning), powerline facility inspection, and operation and maintenance of powerline facilities; and

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Dated: February 7, 2022

Meryl Harrell,

Deputy Under Secretary, Natural Resources and Environment.

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